IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

versus

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

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This brief is being filed with the consent of the parties.

INTEREST OF THE AMICUS

COLPA is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The federal regulation and legislation challenged by petitioner—Section 1605.1 of the EEOC Regulation and Title VII of the Civil Rights Act of 1964, as amended in 1972 by the addition

of Section 701(j)[1]—and similar State anti-discrimination laws have opened employment doors which had previously been closed to the Sabbath observer. Orthodox Jews, who are enjoined by Biblical command to "observe the Sabbath day and keep it holy" and "not [to] do any manner of work" on that day (*Deuteronomy* V, 2, 14), did not enjoy equal employment opportunities and were barred by employment policies from positions open to other individuals in our society. They were turned away from job after job and suffered economic hardship only because they steadfastly refused to violate the Biblical injunction against working on the Sabbath. Before the enactment of these laws, Sabbath observers were "free" to practice their religion, but this "freedom" often carried a severe penalty—inability to secure employment, and loss of jobs when their Sabbath observance became known.

With the announcement of Section 1605.1 and enactment of Section 701(j) (as well as similar State laws), there dawned a new era in which Sabbath observance was no longer the obstacle to employment it once had been. Recognizing the crucial importance of employment opportunities for *all* Americans, the EEOC, and then the Congress, directed that an employer may not reject or terminate a Sabbath observer unless the employer establishes that his employment or retention would cause undue hardship to the operation of his business. The law made the phrase "equal employment opportunity" a reality for the religious observer in our society.

[1] References made to "Section 701(j)" in this brief should generally be taken to include 29 C.F.R. § 1605.1 (1975), which is the model on which the 1972 legislation was based and which, according to its legislative history, was meant to be enacted into law by Congress in 1972.

Hence the statute under attack is of vital importance to our community. Its salutary effect cannot be overemphasized. In the past ten years COLPA has assisted hundreds of individuals in informally enforcing their rights under this statute and under similar State antidiscrimination laws. These cases have involved the widest variety of employment. We can attest to the fact that numerous individuals have become gainfully employed, enjoying equal benefits with all other citizens. We can also attest to the fact that in nearly all cases where "hardship" has initially been asserted by an employer, and where the Sabbath-observing employee has then been hired or retained because of the operation of law notwithstanding the expected "hardship," the reality has belied the anticipation. "Hardship" is too often a facile excuse for an unwillingness to undergo some slight inconvenience, or to depart from an inflexible policy, whose inflexibility is unsupported by reason. Congress' enactment of this law, cast in terms of moderation, reasonableness and deference to actual proof of legitimate employer hardship, is a sound and sensible means of prohibiting thoughtless discrimination while acknowledging those instances where real hardship exists. This Court should not overturn so considered and thoughtful a legislative judgment.

QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment is violated by a federal interpretive regulation of the EEOC and a federal statute which require private employers to make "reasonable accommodation" to the religious observances and practices of their employees and forbid rejections, demotions or refusals

to promote religious observers unless an employer can demonstrate that an employee's religious observance creates "undue hardship" on the conduct of his business.

2. Whether the "undue hardship" standard of Section 701(j) of the Civil Rights Act of 1964, as amended, is satisfied by proof that co-employees were unhappy that a religious observer was absent on Saturdays without any proof of financial harm caused by his absence or any effort by the employer to adjust overtime work schedules or pay scales to achieve a fair distribution of supervisors' overtime assignments.

STATEMENT

In April or May 1969, Paul Cummins—an employee of more than ten years' standing at the Parker Seal Co. plant in Berea, Kentucky—began regular attendance, with his family, at the Sabbath services of the World Wide Church of God in Lexington. The Church, which has other congregations in Kentucky at Bowling Green, Louisville and Covington (R.98), observes the Sabbath from sundown on Friday to sundown Saturday, and a fundamental tenet of its faith is that members in good standing may not engage in "normal labor and work" on the Sabbath, but must spend that day in church attendance and total rest (R. 37, 52).

Mr. Cummins was, by this time, a supervisor of the "Banbury" department of the plant, and he was requested to work in this capacity at times other than the 40 hours a week which comprise the normal work schedule at the plant. When the overtime was scheduled for Saturdays—which happened, on an average, every other week—Mr. Cummins would work part of the day and then leave to take his family to the Sabbath services (R.61-62). On his departure, the supervising of the 8 to 10 employees in the "Banbury" department was done by the foreman of the adjoining department (R. 63). Mr. Cummins worked on Sundays whenever the plant ran on that day, and he advised those in the adjoining department that he was available "to fill in at any other time than my Sabbath or an annual holy day" (*ibid.*).

Sometime in July 1970, Mr. Cummins became a full member of the Church and began total observance of the Sabbath. He advised his superiors—the general foreman and the plant manager—that he would no longer be available for any Saturday work, but that he was ready to work at "any other time . . . he could name the hours or the time, what he wanted me to do and I would be glad to take care of that" (R. 65). After considering the matter for a few days, the man who was then plant manager, Conley Saylor, told Mr. Cummins that he "still had a job and that [he] could observe the Sabbath" (R. 66). Thereafter, Mr. Cummins did not work on Saturdays, but he did fill in for others and told the supervisors in other departments that he "would be glad to work for them anytime that they needed relief" (R. 67-68). He told Saylor, according to the latter's testimony, "I'll come in and work Sunday or any other hours that you ask me to irregardless (*sic*) of what they might be. Outside of Saturday I'll work any hours that you request that I do so" (R. 115-116). It was not necessary to hire any extra person to do Cummins' work while he was absent; the supervisor in the adjoining department ("Stock Prep.") covered the job (R. 117, 196).

In November 1970, Saylor was replaced by a new plant manager, L. G. "Dutch" Haddock (R. 210).

Haddock testified that he was assigned to Berea from another Parker plant because there were "economic" and "supervisory" problems in Berea which he was to straighten out (R. 173). Haddock testified that he did not learn that Cummins was absent on Saturdays until either the Spring or the Summer of 1971—more than half-a-year after he came on the job (R. 173-174). When he learned that Mr. Cummins' unavailability was based on religious conviction, he talked to Cummins and told him that he had "a complaint" from another supervisor about Cummins not working on Saturdays (R. 71). Haddock asked Cummins "if there was any possibility of his being able to change his ideas or anything like that," and Cummins replied that "he was firmly fixed with his religion" (R. 178). Haddock then advised Cummins that he was fired because he was unavailable for work on Saturdays.

ARGUMENT

Introduction and Summary

This Court has recognized, at least since *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940), that the fundamental principles underlying the Religion Clause of the First Amendment protect not merely "freedom to believe" according to one's religious scruples, but also "freedom to act" in accordance with the tenets of a religious creed. This case is of critical concern to the many thousands of Americans whose religious convictions require them to perform specified acts or to refrain from certain kinds of conduct at particular times. The constitutional question presented is whether Congress violates the Establishment Clause of the First Amendment if it gives explicit legislative recognition and particularized protection, in the context of an

employment relationship, to conduct that is compelled by a religious faith. That question must be considered in light of the limitations expressed by the Congressional enactment to the statutory right being conferred. Only *reasonable* accommodation is required, and an exemption is permitted if there is proof of *undue* hardship to the employer's business. Federal courts considering Section 701(j) have, for these reasons, determined that it is constitutional. *Hardison* v. *TWA Inc.*, 527 F.2d 33 (8th Cir. 1975), certiorari pending, No. 75-1126; *Jordan* v. *North Carolina Nat'l Bank*, 399 F. Supp 172 (W.D.N.C. 1975); *Ward* v. *Allegheny Ludlum Steel Co.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Scott* v. *Southern California Gas Co.*, 8 EPD ¶9450 (C.D. Cal. 1973).

The statutory question presented by this case is whether legislative protection for employees was intended by Congress to be overridden by proof of dissatisfaction on the part of other employees over the greater safeguards given to religiously motivated practice than to nonreligious preferences. That question must be considered in light of the superficial and facile explanations that may be made, on grounds of "even-handedness," for discriminations based on religious observance.

This Court has long recognized that religion—like speech—is entitled to special protection, not merely by virtue of the constitutional language but also through legislative implementation of "free exercise values." These "values" arise not only in governmental relationships controlled directly by the First and Fourteenth Amendments but also in private relationships subject to legislative regulation, such as private em-

ployment. And it should be as firmly established in the area of religious rights, as it is with respect to the rights of racial equality and rights to suffrage and speech, that hostility by others or popular inability to understand judicial and legislative protection does not justify destruction of a minority's rights.

Accordingly, we argue *first* that when Congress is merely defending or shielding a religious observance against thoughtless or hostile discrimination by a private employer, the test of constitutionality is whether the statutory protection reasonably implements the legislative objective. In that circumstance, where religious observance is "aided" only in the sense that its exercise is facilitated, and where the observance poses no "substantial threat to public safety, peace or order" (*Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963)), any reasonable legislative protection is enough to overcome First Amendment objections. We then argue that the tripartite test applied in the financial-aid-to-private-school cases is, in any event, satisfied.

I

The Establishment Clause Is Not Violated By Statutory Protection For An Employee's Religious "Observance And Practice" Which Requires A Private Employer To Make "Reasonable Accommodation" To Such Religiously Motivated Conduct

The constitutional challenge to Section 701(j) of the Civil Rights Act of 1964, as amended in 1972, is, in principle, similar to the constitutional challenge that was made and summarily rejected by this Court almost 60 years ago in the *Selective Draft Law Cases*, 245 U.S. 366, 389-390 (1918). Speaking there of the conscientious objector exemption of the draft law,

which was limited to adherents to established religious groups, Chief Justice White said for a unanimous Court (emphasis added):

> And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof, repugnant to the 1st Amendment, resulted from the exemption clauses of the act to which we at the outset referred *because we think its unsoundness is too apparent to require us to do more.*

The constitutionality of the conscientious objector exemption has been the subject of more recent analysis in this Court. Relevant to this case is the separate opinion of Mr. Justice White, speaking also for the Chief Justice and Justice Stewart, in *Welsh* v. *United States*, 398 U.S. 333, 367-374 (1970). The issue discussed in the separate *Welsh* opinion was whether the Establishment Clause permitted Congress to treat differently, for draft exemption purposes, those whose conscientious objections grow out of religious belief than those "whose views about war represent a purely personal code arising not from religious training and belief . . . but from readings in philosophy, history, and sociology." 398 U.S. at 367. The three dissenters in *Welsh*—treating the constitutional issue not reached by the majority—concluded, in terms applicable here, that "free exercise values" may justify legislative action "shielding religious objectors" while denying the same protection to the nonreligious, and that such legislation does not violate the Establishment Clause.

Petitioner's constitutional claim is basically that any special recognition of religion amounts to a preference of religion over nonreligion and necessarily violates the three-part Establishment Clause test most recently

applied in *Meek* v. *Pittenger*, 421 U.S. 349, 350 (1975), and in *Roemer* v. *Board of Public Works*, No. 74-730, 44 U.S. Law Week 4939 (U.S., June 21, 1976). We believe, for reasons discussed at some length below, that the three-part test is not violated by Section 701(j). But we submit initially that the three-part test is, at all events, not the proper constitutional measure for a law that is defensive in nature in that it is designed to secure, against discriminatory consequences, the exercise of religious beliefs and practices that do no harm to society and that are based on solemn and sincere religious scruple.

We note, preliminarily, that this was precisely the approach taken by the Chief Justice, and Justices Stewart and White, in *Welsh*. Explaining their conclusion that a military exemption limited to religionists is not constitutionally invalid because it excludes nonreligious believers, the three Justices suggested initially that Congress' exemption for religious conscientious objectors may have been "a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service." 398 U.S. at 369. On this ground, it was said ((*ibid.*); emphasis added):

> Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. *On this basis, the exemption has neither the primary purpose nor the effect of furthering religion.*

The remainder of the *Welsh* dissent discussed the *alternative* ground that Congress may have enacted

the conscientious objector provision as "a recognition . . . of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause." This latter discussion proceeded on the premise that Congress may *not* have made the "practical judgment" previously discussed—in other words, that the exemption for religious objectors may, in fact, have had either the primary purpose or effect of "aiding religion." Nonetheless, the Chief Justice and Justices Stewart and White concluded that the law was constitutional. On this approach, it appears that where Congress "aids" individual religious practice only to the extent of accommodating a legislative enactment to "free exercise values," its action does not violate the Establishment Clause even if a "purpose or effect" of the law is to assist religious believers.

(A) Our Suggested Test of Constitutionality

Obviously, every protection for religious liberty somehow "aids" or "furthers" religious activity. "It cannot be ignored that the First Amendment itself contains a religious classification." 398 U.S. at 372 (dissenting opinion in *Welsh*). The Civil Rights Act of 1964—even before the 1972 amendment at issue here—prohibited discrimination in employment on account of "religion." Even if that law protected only religious *belief* and not religious observance or practice, it would have had the "purpose and effect" of "furthering" religion by assuring to all those who professed a religious faith that they could not be harmed, in private employment, on account of their beliefs. Yet petitioner does not remotely challenge the law's application to religious belief.

Plainly, then, an anti-discrimination or protection-of-religious-liberty law is judged by different constitutional standards than laws, such as those in *Meek* and *Roemer,* which affirmatively provide financial assistance to private institutions or hand out other forms of bounty. This principle is proved by the accepted constitutional validity of religious exemptions from a variety of regulatory or other statutes. There seemed to be general agreement, for example, at the time of *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), that an exemption for religious Sabbatarians from the operation of Sunday Closing Laws was constitutional, even though—by the Court's own reasoning—Sabbath-observers who keep their shops open on Sunday might thereby be given "an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608-609. Notwithstanding this possible advantage, the Court majority said that a Sabbatarian exemption "may well be the wiser solution to the problem." There was no suggestion that this solution might give rise to constitutional problems under the Establishment Clause because it necessarily "furthered" the practice of Sabbatarian faiths. See also *McGowan* v. *Maryland,* 366 U.S. 420, 512-520 (1961) (Frankfurter, J., concurring: "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it.")

Various exemptions granted to religionists by court order or legislative action fall into the same category. In the landmark case of *Sherbert* v. *Verner,* 374 U.S. 398 (1963), for example, this Court determined that an exemption from compensation ineligibility was constitutionally required for Sabbatarians who are unable

to accept a job requiring Saturday work because of their conscientious scruples; the Court explicitly rejected the notion that such an exemption would be "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina." 374 U.S. at 409. Indeed, even the late Justice Harlan, who dissented in *Sherbert,* objected only to the ruling that an exemption was *constitutionally* mandated. 374 U.S. at 420. He noted his view "that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant." 374 U.S. at 422.

A similar approach was followed in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Upon concluding that the Free Exercise Clause of the First Amendment requires Wisconsin to exempt Amish parents from certain provisions of the State's compulsory education law, the Court disposed, in a footnote, of the kind of claim made here (406 U.S. at 234-235, n. 22):

> What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In *Walz* v. *Tax Commission,* the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. 664, 668 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their cen-

> turies-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner,* 374 U.S. 398, 409 (1963).

Legislative exemptions for religionists have also been frequently enacted and consistently sustained. The Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), and the constitutionality of such an exemption was sustained in *People* v. *Marquis,* 291 Ill. 121, 125 N.E. 757 (1919). The federal tax laws now contain an exemption from the payment of Social Security taxes for members of the Amish sect. 26 U.S.C. § 1402(h). Special statutory provisions for those having religious objections to abortions or other terminations of pregnancy (*e.g.,* N.Y. Civ. Rights Law § 79-i (McKinney Supp. 1975)) or for those having religious objections to autopsies (*e.g.,* Md. Code Ann., art. 22, § 6, as amended 1976) have recently been enacted.

As to each of these judicial or statutory exemptions, as with the prevalent Sabbatarian exemptions to Sunday laws (*e.g.,* 366 U.S. at 553-559), it could be argued —as it is being argued here—that the "primary purpose and effect" of the particular provision is to aid religious practice. On its face, that is plainly true. But this Court recognized in *Yoder* that there is a constitutional difference between the "sponsorship or

active involvement" that is prohibited by the Establishment Clause and the essentially defensive protection granted by statutes such as this one to permit religious observances to be performed without the kind of impediment that might be caused by adverse employment consequences.

Nor is there any significance (as petitioner contends at pp. 38-40 of its brief) to the fact that in the above situations the exemption relates to a state-imposed regulation or prohibition, whereas Section 701(j) affects *private* employment. To be sure, in the absence of a statute prohibiting employment discrimination on account of religion, a private employer is not obliged by law to adjust his practices to the free exercise of religion by his employees—just as he is not obliged to refrain from discrimination on the basis of race or sex. But the values underlying the First Amendment surely entitle legislatures in this country to protect religious beliefs and practices against private coercion and intimidation. In *Griffin* v. *Breckinridge,* 403 U.S. 88, 104-107 (1971), this Court unanimously sustained the constitutionality of a Reconstruction civil rights act which, as construed, reached "private conspiracies to deprive others of legal rights." In that case, as in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), and in *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), the Court recognized that private racial discrimination is subject to legislative condemnation on account of the same policies as sustain the prohibitions of the Fourteenth Amendment to state-imposed racial distinctions.

For the reasons stated above, we believe that the constitutionality of laws such as Section 701(j) under

the Establishment Clause should not be measured by the now-hallowed "tripartite" test applied when a form of state financial assistance to religion or an official religious exercise is authorized, sponsored or commanded by State law. Rather, the proper test should be whether the enacted legislation is a reasonable means of protecting the free exercise of religious beliefs and practices. The Constitutional draftsmen set no priority as between the Establishment and Free Exercise Clauses. Indeed, the history of the Religion Clause (set out fully by Professor Leonard W. Levy in "No Establishment of Religion: The Original Understanding," *Judgments* (1972), pp. 169-224) tends to show that the Establishment Clause was adopted as one means of securing the free exercise of religion—so that the latter is the more important of the two provisions. We disagree totally, therefore, with petitioner's assertion that in the case of a conflict between the Free Exercise and Establishment Clauses, non-establishment must "prevail" (Pet. Br. 39). This Court has recognized that "tension inevitably exists between the Free Exercise and the Establishment Clauses" (*PEARL* v. *Nyquist*, 413 U.S. 756, 788 (1973)), and the proper legislative duty is not to select one over the other but to see to it that both constitutional interests are taken into account.

(B) The Tripartite Test.

Even, however, if the three-part test were applied, Section 701(j) would pass muster.

(1) *Purpose*—Viewed in context, Section 701(j)—which is a *definitional* provision—has an essentially secular purpose: to ensure that to the extent possible

employees are judged, by those affording employment opportunities, on the basis of their individual merit and not on the basis of considerations over which they have no personal control and which employers ought not to take into account. Just as employment discrimination based on sex, national origin, age (29 U.S.C. § 621) or race is forbidden by federal law, the 1972 amendment relating to religion prohibits employers from taking an employee's religious observance or practice into account. The purpose of a prohibition against discrimination on account of age, sex or national origin is not to "further" or "aid" any particular age, sex or national group; it is, rather, to keep invidious and unmeritorious considerations out of the employment process. Similarly, a prohibition against an employer's consideration of Sabbath-observance has, as its purpose, compelling employers to exclude such irrelevant factors from their decision-making process.[2]

The legislative background of Sec. 701(j) clearly indicates that it was designed to foster, in the area of religious discrimination, the overriding purpose of the Civil Rights Act of 1964—*i.e.*, the promotion of equal employment opportunity. As the court below concluded (Pet. App., p. 33a):

> [W]e believe that Regulation 1605 and § 2000e(j) are sustained by an adequate secular purpose. The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment.

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[2] The "undue hardship" proviso, on the other hand, permits a religious practice to be considered if there is a truly substantial effect on the business practice.

Senator Jennings Randolph, the bill's sponsor, specifically stated his purpose in presenting the amendment to the Senate: "[M]y desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law" (118 *Cong. Rec.* 705). He then proceeded to detail the problems individuals faced in employment only because of religious requirements that they abstain from Saturday work. He observed that individuals under the Civil Rights Act of 1964 were intended, in his view, to be protected in their religious practices (118 *Cong. Rec.* 705-706):

> This amendment, is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it's needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States to go back, as it were, to what the Founding Fathers intended.

The Senator then characterized the Amendment as "a well-intentioned amendment, a good amendment, a necessary amendment, a worthwhile amendment, because it carries through the spirit of religious freedom under the Constitution of the United States" (118 *Cong. Rec.* 706).

Senator Dominick presented some factual situations in which an observant employee would face problems because of an employer's scheduling practices. Senator Randolph explained the protection afforded by the proposed Section 701(j), and Senator Dominick responded, "I think this amendment will be helpful." Senator Williams then stated that "[i]t seems to me that this codifies a very worthy general practice . . ." and noted that he and other Senators permit their own staff employees to observe their holy days "even though they are regular working days . . ." (118 *Cong. Rec.* 706). Senator Williams then raised the applicability of the First Amendment, and dismissed any Establishment claim because he felt that the Amendment merely permitted the free exercise of religion (118 *Cong. Rec.* 706).

Senator Randolph concluded consideration of the Amendment and called for a vote on the measure with the following words (118 *Cong. Rec.* 730):

> Mr. President, religious liberty is a precious liberty. With this thought, Mr. President, I ask for the yeas and nays on the amendment.

Thereupon *all* 55 Senators present in the chamber voted in favor of the amendment. Twelve absent members indicated their support of the measure, and the remainder stated no position (118 *Cong. Rec.* 730-731). The House of Representatives subsequently adopted the Senate measure.

In light of the foregoing, four things are clear:

First, Section 701(j) grew out of a concern for equal employment opportunity, not a desire to encourage religious observance.

Second, evidence of the need for Section 701(j) to obviate harmful discrimination and permit the observant and qualified to be gainfully employed was fully before the Senate.

Third, assisting churches or religious orders was far from the minds of the Senators. Conversely, assistance to religious schools may well have been in the minds of the legislators who enacted the private-school aid laws which this Court has struck down in recent Terms.

Fourth, the Congress considered—and rejected—the argument that the law would be favoring or establishing those religions that require Sabbath-observance.

In enacting Section 701(j), Congress simply set about to foster equal employment opportunity by requiring that employees be excused from work when their religion forbade such work and no hardship could be shown to result. A statute carrying out this purpose is plainly constitutional.

(2) *Effect*—The court below properly concluded that "the primary effect of Regulation 1605 and [Section 701(j)] is to inhibit discrimination, not to advance religion." Pet. App. 37a. A law that says to employers that they may not reject or fire a Sabbath-observer unless they can demonstrate that it is an "undue hardship" to keep him on the job is a far cry from the massive subsidy of religious schools that was found to violate the "direct and immediate effect" standard in *PEARL* v. *Nyquist,* 413 U.S. 756 (1973). Whereas "maintenance and repair" grants to parochial schools may "subsidize and advance the religious mission of sectarian schools" (413 U.S. at 779-790), securing a prospective employee's right to a job irrespective of his Sabbath-observance has no such "subsidizing" or "advancing" effect. Similarly, grants given to parents as "an incentive . . . to send their children to sectarian schools" have the same "substantive impact" as funds

paid directly to the school for religious purposes. But an employee's paycheck is entirely different from a tuition grant. His church may ultimately benefit from money he receives, but that consequence is "remote and incidental," not "direct and immediate." 413 U.S. at 783-784, n. 39.

Applicable to this case is not the holding of the financial-aid-to-private-school cases, but the observation made last Term in *Roemer:* "*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer* v. *Board of Public Works,* No. 74-730, 44 U.S. Law Week 4939, 4942.

Nor is the effect of Section 701(j) unconstitutional on the ground that certain religions are more favored than others. In fact, *all* aspects of religious observance and practice—not merely Sabbath observance—are covered by the law, and *all* religions are treated equally. The fact that some religions may have more or different kinds of religiously-dictated observances than other religions does not invalidate a law that applies to all faiths equally.

(3) *Entanglement*—The court below properly analyzed the statute and determined that the kind of inquiry that would have to be made by governmental officials in administering the law involves a close examination of labor relations and business administration problems, and not a forbidden inquiry into religious beliefs. "For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be

considered in the labor relations context and their resolution certainly does not necessitate any government entanglement with religion." Pet. App. 38a.

The nature of any governmental inquiry into religion is, in fact, the same as is required under the judicially created exemption in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). In *Sherbert,* this Court made short shrift of the claim that feigned religious objections might be asserted (374 U.S. at 407), and we see no other ground under Section 701(j) than *bona fides* on which an employee's religious claim would require close governmental scrutiny. Indeed, the discussion at pages 34 to 36 of petitioner's brief emphasizes the *bona fides* issue almost exclusively.

Finally, petitioner's most extraordinary "entanglement" argument is its claim that resentment or grumbling among other employees is a divisive factor that forms one aspect of forbidden entanglement (Pet. Br. 37). Entanglement has, however, been defined consistently as "government involvement," not interference or hostility by private parties. Divisiveness generated by unjustified hostility over the exercise of a statutory or constitutional right cannot be the basis for defeating the right. It would be a curious rule of law that would make an employee's civil rights depend on a favorable poll of his co-workers. Moreover, any significant resentment (by no means indicated on this record) can be dealt with by employers in the same way other personnel problems are handled. Employees should be educated to respect the conscientious beliefs of their fellow-workers—just as they must learn to accept co-employees regardless of race or national origin—particularly when such respect is required

by the law of the land, and particularly when, as the statute commands, the only accommodation to religious practice required is what is "reasonable" and does not impose an "undue hardship" on the employer's business.

II

"Undue Hardship" Has Not Been Established Where The Duties Of The Employee Who Is Unavailable For Work May Be Readily Assumed By Others

Petitioner argues at substantial length that it attempted to accommodate to Mr. Cummins' religious observance, and that its accommodation was reasonable, but unsuccessful. To buttress this argument, petitioner lists nine "factors" which it views as relevant to the ultimate determination. As to each of these "factors," petitioner says, it supports petitioner's conclusion that it proved what Section 701(j) requires.

The enumerated "factors" are, we believe, relevant to some situations arising under Section 701(j) and irrelevant to others. For example, the number of "alternative avenues of accommodation" (Pet. Br. 48) is hardly important if there is one simple and straightforward means of accommodating. If, for example, a plant works on a seven-day schedule and employees may pick any six days, a Sabbath observer may easily be accommodated by his selection of Sundays. It then makes no difference whether there are other alternatives. Similarly, the availability of a "pool of fellow employees . . . to serve as substitute workers" (Pet. Br. 48-49) is not relevant at all if no substitution is required. And the same is true of the question whether replacements are sought regularly or infrequently (Pet. Br. 50).

A less elaborate approach than petitioner's, but one more geared to reaching the result intended by the policy of the statute, is to evaluate how the employer is able to conduct his operation while retaining or hiring the Sabbath-observer. In the present case, such an approach produces the result reached by the court of appeals—*i.e.*, that accommodation would not generate undue hardship. The evidence was uniform and consistent that during the one day approximately every two weeks when Mr. Cummins was absent (overtime work being scheduled on an average of every other Saturday), supervision of the Banbury department was done by the supervisor of the adjoining department—usually Chester Webb. The operation ran so smoothly in this fashion that it took more than half-a-year for the new plant manager (who had been hired to iron out inefficiencies) even to discover that Mr. Cummins was absent on these days. Mr. Webb explained his supervisory duties by reporting that he "just went over there to make sure they were working and there wasn't nothing down, any machinery broken down or anything like that" (R. 152). The plant manager in charge until November 1970—who initially agreed to keep Mr. Cummins on—said that "it's always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Preparation Supervisor covered both sides of it" (R. 117). His conclusion was that, notwithstanding his absences, Mr. Cummins "did a very adequate job" (R. 119).

What, then constituted the "undue hardship" that petitioner claims was proved? Since no special employee had to be hired and, in only rare instances, did a supervisor not otherwise on duty have to be assigned,

there was neither added expense nor substantial assignment of substitutes. Apparently, the sole argument is that two supervisors expressed unhappiness over the fact that they were working on Saturdays and Mr. Cummins was not.

If that argument, of its own, is to be given any weight at all, no protection can ever be afforded to a conscientious Sabbath observer. By definition, such religionists will be absent every Saturday, and if the plant is ever in operation on Saturdays, others will feel that they alone are being asked to work on that day. Yet in the regulation which was the forerunner for Section 701(j), the EEOC contemplated, as the last sentence of Section 1605.1(b) indicates, that accommodation will often require work by others "during the period of absence of the Sabbath observer." And a parallel Civil Service regulation, adopted by the Civil Service Commission as a standard for the federal government, also contemplates reassignment of others to Saturday shifts. See 5 CFR § 713.204(g), which requires a government agency to (emphasis added):

> Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (*by substitution of another qualified employee,* by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so.

Moreover, on the record in this case it does not appear that the unhappiness of the other supervisors was

exclusively attributable to the uneven Saturday shifts. In the record, and in the petitioner's brief, it is asserted that other supervisors were working as much as 72 hours a week while Mr. Cummins continued to work only 40 hours a week (Pet. Br. 9). Plainly this lopsided schedule was not related to Cummins' Sabbath observance. Even if one deducts 10 hours for every Saturday worked by the others (averaging 5 hours per week in view of the once-every-second-Saturday schedule), there is still a difference of more than 25 hours per week betwen the scheduled assignments of Cummins and the others.

Why—as the court below noted—was Cummins not assigned to more supervisory hours during the week? One possible answer supports his appraisal of the "supervisory" duties at the Banbury department—there was not enough to do, beyond the scheduling which he fully accomplished on weekdays, to assign him to more supervisory hours at Banbury. The failure to give him more overtime hours seems particularly inexplicable in light of the unconditional statements he made in July 1970—quoted in our Statement (p. 5, *supra*)—that he would be willing to be assigned to any hours at any time, so long as he did not have to work on the Sabbath. See also R. 63, 67-68, 74, 78, 99, 115, 119, 141, 153. If Messrs. Webb and Cummins worked on average of 110 hours per week between them (of which 5 were on Saturday), it would have been a simple scheduling matter to have assigned 55 non-Saturday hours to Cummins and 50 non-Saturday hours and 5 Saturday hours to Webb. Listing Mr. Cummins as a "substitute" and expecting him to volunteer for extra work *to the supervisor whose place he would take* cast on him the employer's burden (R. 183, 185).

Petitioner's failure to work out this equitable arrangement—or even to suggest any arrangement under which Mr. Cummins' salary might be reduced if he worked less overtime than other supervisors—bespeaks, we believe, the true motive behind Mr. Cummins' discharge. When Cummins indicated to "Dutch" Haddock that he was a religious observer, he became too much of an inconvenience for Haddock to bother with. Rather than having been treated like other supervisors and working around his conscientious disability, he had been shunted off to one side, and those who worked with him soon found this isolation unacceptable. Was it coincidental that when Mr. Saylor was plant manager, accommodation seemed reasonable and desirable, but that after Mr. Haddock, the new manager, learned of Cummins' unavailability, asserted "undue hardship" infected the operation, and Mr. Cummins could no longer be tolerated?

This Court recognized in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that employment practices "fair in form" could be "discriminatory in operation." 401 U.S. at 431. Nowhere is this more true than with respect to religious observances. An employer may *say* that he needs all his employees six days a week or that none may wear a skullcap or that all must eat the hot lunch provided by the company. Such rules seem even-handed, but they apply discriminatorily to those whose religious scruples would be violated by compliance.

Congress has ordered in Section 701(j) that such superficial explanations are not to be accepted at face

value. Instead, a court must make a searching examination of the true impact that reasonable accommodation would have on the business operation of an employer. The employer must demonstrate not just hardship; he must prove *undue* hardship. And the hardship may not be the inconvenience or unhappiness of his employees; it must have to do with the business necessity of his operation.

In this regard, the one year's experience while Mr. Cummins was being accommodated was most instructive. Rather than "taxing" petitioner with the fact that it accommodated, the court below used the actual experience as a barometer of how burdensome future accommodation would be. It concluded, quite properly, that it was not burdensome at all. There was no added expense,[3] there was no demonstrated reduction in efficiency or output, and there was no extraordinarily untoward impact on employee relations. At worst, there was some slight inconvenience that could have been adjusted and overcome with minimal ingenuity and good will. In these circumstances, the statutory standard was not satisfied.

Nor did the court below improperly substitute its judgment for that of the district court on the question of undue hardship. The district court had before it only a dry record; it heard no witnesses and judged no credibility. Consequently, the appellate court was in equally good position to weigh the sufficiency of the justification—which was, in any event, a legal question—as the district court.

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[3] We do not, of course, concede that added expense constitutes "undue hardship." Indeed, we believe that some additional cost is a permissible price to pay for preserving religions freedom.

This is particularly true in light of the fact that the burden of proof rested with the employer. An *amicus* brief supporting the petitioner challenges this allocation of the burden and asks this Court to "reconsider" the burden of proof requirement because it compels the employer to prove a negative—*i.e.*, that he is unable to accommodate without undue hardship. But it is the employer who has all the information concerning business operations at his disposal, and it is he who can readily explain—if explanation is possible—why an accommodation is not feasible.

We have previously observed that the most common danger in this area of discrimination is that it is easy to verbalize a general justification for any discrimination based on unusual practices or conduct. It is, on the other hand, hard to challenge rules that appear uniform and to probe their true purpose and application. It is, therefore, essential for the effective implementation of this law to retain the burden of proof where the expert agency and the Congress have placed it—with the employer who has the fund of necessary information.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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